No. 90-548

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In The Supreme Court Of The United States

OCTOBER TERM, 1990

DAVID L. FOSTER, by his Guardian ELIZABETH L. FOSTER,
Plaintiff-Appellant,

Petitioner,

v.

UNITED STATES FIRE INSURANCE COMPANY,
Defendant-Appellee,

Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this case merits summary reversal and remand pursuant to Supreme Court Rules 10.1(a) and 16.1 when it is undisputed that the only issue that can be dispositive of this case is a question of state law which was never addressed by the court of appeals?

DESIGNATION OF PARTIES

The parties to the appeal before the United States Court of Appeals for the Fourth Circuit were David L. Foster, by his Guardian, Elizabeth L. Foster, plaintiff-appellant, and United States Fire Insurance Company, defendant-appellee. Said parties are the same as were before the court of original jurisdiction, the United States District Court for the Western District of Virginia, Danville Division.

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VIRGINIA SUPREME COURT

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RULES OF COURT

Rules 10.1 (a) and 16.1 of the
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ARGUMENT

Respondent's Brief in Opposition does not dispute that the court of appeals' sua sponte holding that contract language is a question of fact, subject to review under the clearly erroneous standard, departs from the accepted principle that contract language is a question of law reviewable de novo. Rather, Respondent attempts to avoid addressing the merits of this Petition by asserting that this case was correctly decided by the court of appeals under applicable Virginia law.

This attempt must be rejected because the opinion of the court of appeals plainly states that it's decision is based solely upon application of the clearly erroneous standard of FRCP 52(a) in accordance

with its decision in Davis v. Food Lion, 792 F.2d 1274, 1277 (4th Cir. 1986) (an action to recover uncompensated overtime under 29 U.S.C. § 207 (a) (1)). (App. 11, 12).

There is no dispute that settled Virginia law holds contract language to be a matter of law subject to de novo review. Nevertheless, the court of appeals refused to apply Virginia law to this contract interpretation case because it held, without citation to any authority, that contract interpretation was a fact issue subject to review under FRCP 52(a). (App. 11, 12).

Respondent's claim that the court of appeals decided this case under Virginia law is simply a gross misrepresentation and it would be manifestly unjust to deny this Petition

on that basis because the very error Petitioner complains of is the court of appeals failure to apply Virginia law, de novo, to the contract interpretation issue presented by this case.

Since the trial court found no facts and the court of appeals decision was not based on Virginia law, the Respondent's Brief asks this Court to pretend that both those events happened. Once this pretense is recognized, the arguments advanced by Respondent's Brief in Opposition are clearly groundless.

Respondent's Brief in Opposition discusses two circumstances mentioned by the trial court as evidence that USFIC and the funeral home did not intend for the Medalist policy to cover accidents such as the one in which Foster was injured, viz: (1) no testimony from the

funeral home president, William A. Collins, Jr., that he, or his wife, believed that the Medalist Policy covered this accident and (2) the funeral home at some unspecified time declined to purchase an umbrella policy. Respondent contends that in view of settled Virginia law that courts are to ascertain and effectuate the intent of the contracting parties then the two circumstances mentioned are sufficient for a finding that USFIC and the funeral home did not intend to cover Foster's accident. However, Respondent conveniently overlooks that the trial court made no findings of fact (App. 32) and that the court of appeals decision was not based on Virginia law. (App. 11,12).

If it is assumed that the trial

court made a finding of fact about the parties' intent to cover Foster's injuries under the Medalist policy, the Respondent has misstated the Virginia law applicable to that fact.

Respondent correctly cites Virginia Supreme Court decisions holding that courts are to ascertain and effectuate the intent of the parties in interpreting contract language. However, Respondent fails to point out the method prescribed by those decisions for ascertaining and effectuating the intent of the parties.

Jackson v. North American Assurance Society of Virginia, 212 Va. 177, 183 S.E.2d 160 (1971), cited by Respondent, clearly defines the method for deriving the intent of the parties to an insurance contract:" . . . an

established rule may suffice to supply the parties intention . . .: If language used in an insurance policy is susceptible of two meanings, one of which will permit recovery and the other will not, the language should be construed most favorably to the insured." Id. at 177, 178.[1]

Under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), Petitioner was entitled to de novo review of the contract interpretation issue presented

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[1] Respondent also overlooks settled Virginia law holding that (1) the availability of separate, additional coverage is irrelevant to the determination of whether particular policy language provides coverage, and (2) an insured's belief about the scope of coverage afforded by the policy is also irrelevant in deriving the meaning of policy language. Webb v. USAA, 235 Va. 655, 657-8, 369 S.E.2d 196, 198-9 (1988); Carey v. State Farm Mutual Insurance Company, 247 F. Supp. 381, 384 (E.D. Va. 1965), aff'd 367 F.2d 938 (4th Cir. 1966).

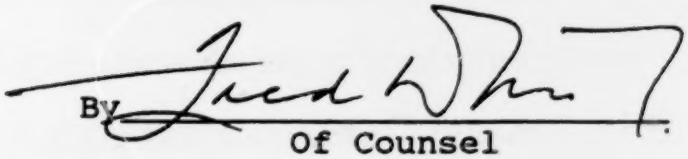
by this case and to the application of Virginia law. Petitioner received neither.

CONCLUSION

There being no dispute that under Erie Railroad Co. v. Tompkins the court of appeals was required to review this case de novo and apply Virginia law, and it appearing from this record that the court of appeals has failed to do that, Petitioner respectfully requests that the decision of the court of appeals be summarily reversed and this case remanded with instructions to review the issue presented de novo under Virginia law.

Respectfully submitted,

DAVID L. FOSTER, by his Guardian, ELIZABETH L. FOSTER

By 
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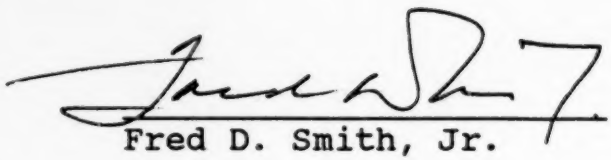
CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 29.3 of the Supreme Court Rules, that I have on this 31st day of October, 1990, mailed, with first-class postage pre-paid, three copies of the foregoing Reply Brief to Respondent's Brief in Opposition to Petition for Writ of Certiorari to Frank O. Meade, and Frank K. Friedman, Woods, Rogers & Hazlegrove, Post Office Box 720, Roanoke, Virginia

24004-0720, who are the only parties required to be served.



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